Conversent Communications

Via Overnight Mail and Electronic Mail

June 21, 2006

Mary L. Cottrell, Secretary
Department of Telecommunications and Energy
One South Station
Boston, MA 02110

Re: Verizon Arbitration, D.T.E. 04-33

Dear Ms. Cottrell:

Conversent's Comments on Verizon's Compliance Tariff are enclosed for filing.

Thank you. Please contact me (401-834-3326 direct dial or gkennan@conversent.com) if you have any questions.

Very truly yours,

Gregory M. Kennan
Director, Regulatory Affairs and Counsel

Cc: Service List

Enclosure

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Petition of Verizon New England Inc. for Arbitration of an Amendment To Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the *Triennial Review Order*	**D.T.E. 04-33**

CONVERSENT'S COMMENTS ON VERIZON'S COMPLIANCE TARIFF

Introduction

Conversent Communications of Massachusetts, Inc. ("Conversent") comments as follows on the tariff revisions that Verizon New England Inc., d/b/a Verizon Massachusetts ("Verizon") filed on June 8, 2006.[1]

In the May 5, 2006 *Compliance Order,* the Department ordered "[t]hat Verizon shall file its compliance tariff consistent with the July 14, 2005 *Arbitration Order*, the December 16, 2005 *Reconsideration Order*, and this Order . . . ." *Compliance Order* at 44. In significant respects, however, Verizon's tariff filing fails to reflect Department's rulings in the various orders in this case. Some of these failures may reflect inaccuracy or imprecision, but others evidently are the result of conscious attempts to insert in the tariff language that Verizon sought, and the Department rejected, in the arbitration. The Department should require Verizon to submit a revised tariff that accurately reflects the Department's rulings.

[1] Conversent expressly takes no position on any tariff revision pertaining to unbundled local switching or any combination involving unbundled local switching.

Discussion

These comments discuss first, changes in the tariff made in the June 8 filing, and second, changes that should have been made to Tariff No. 17 to reflect rulings in this case, but were not.

I. Changes That Do Not Comply with the Rulings in this Docket.

Some of the changes that Verizon is seeking in its June 8 filing do not reflect the Department's rulings. The following are examples.

A. Audits of EEL Eligibility Criteria (Part B, § 13.4.1.E).

The provisions regarding audits of EEL eligibility contradict specific Department rulings and are inappropriately favorable to Verizon. The Department should require Verizon to comply with its rulings.

The offending provisions in the tariff include, in § 13.4.1.E.3, a provision that a CLEC must reimburse Verizon for the entire cost of the audit in the event that the CLEC "failed to comply in all material respects with the eligibility criteria . . . for any DS1 or DS1 equivalent circuit." That is not the standard, and the Department expressly rejected similar Verizon language in the *Reconsideration Order*.

There, the Department expressly determined that the determination of materiality was for the independent auditor to make, and that it was improper to prejudge the materiality issue by stating that noncompliance by one DS1 or DS1-equivalent circuit necessarily was material. *Reconsideration Order* at 56-59. Therefore, the Department required that the provision state, "To the extent the independent auditor's report concludes that ***CLEC Acronym TXT*** failed to comply in all material respects with the service eligibility criteria, then (without limiting

Verizon's rights under Section 3.11.2.2 above) ***CLEC Acronym TXT*** must reimburse Verizon . . . ." *Id.* at 58; *see* Arbitrated Amendment § 3.11.2.6 (filed on May 26, 2006).

Further, the tariff provisions improperly describe the costs of that audit that a non-prevailing party must pay. The proper formulation is:

- Verizon must obtain and pay for the independent auditor;
- if the auditor finds the CLEC in compliance in all material respects, then Verizon must pay the CLEC's "reasonable and verifiable costs of complying with any requests of the independent auditor;"
- if the auditor finds that the CLEC was not in compliance in all material respects with the eligibility criteria, then the CLEC must "reimburse Verizon for the cost of the independent auditor."

Arbitrated Amendment, § 3.11.2.6; *see Reconsideration Order* at 57; FCC *Triennial Review Order (TRO),* ¶¶ 627-28.

Verizon's tariff has this exactly backward. Under the proposed tariff, if Verizon prevails in the audit, the CLEC shall reimburse Verizon for the "cost of the audit." § 13.4.1.E.3. The cost of the audit could include Verizon's internal costs, in direct contradiction to the ruling of the *Reconsideration Order* — and which costs, Verizon acknowledged, it is not entitled to. *Reconsideration Order* at 59. Similarly, if the CLEC is found to be in compliance, the tariff requires Verizon to reimburse the CLEC's "out-of-pocket costs." § 13.4.1.E.4. "Out-of-pocket costs" is too narrow. The term may exclude the costs of staff time and other internal costs, which the CLEC is entitled to recover. "Reasonable and verifiable costs" — the term used in the Arbitrated Amendment — is more accurate.

The Department should require Verizon to conform the tariff provisions to those of the Arbitrated Amendment.

B. Rates that Apply if an EEL Becomes Non-Compliant (§ 13.3.1.B).

If an EEL becomes noncompliant, the tariff would allow Verizon to re-price the facility at rates equivalent to an analogous access service or other analogous arrangement. § 13.3.1.B.

Such open-endedness is inappropriate. In the arbitration, the Department expressly required a provision requiring Verizon to re-price a non-compliant EEL at the lowest rate the CLEC otherwise could have obtained for the substitute facility. *Compliance Order* at 36. The Department's ruling was incorporated into § 3.11.2.2 of the Arbitrated Amendment, as follows:

> The new rate shall be no greater than the lowest rate ***CLEC Acronym TXT** could have otherwise obtained for an analogous access service or other analogous arrangement.

Section 13.3.1.B of the tariff should contain an identical limitation.

C. Charges that Apply If Verizon Prevails in a "Provision-Then-Dispute" Situation (§§ 2.1.1.D.2, 2.1.1.E.1, 5.3.1.D.2, 5.3.1.E.1).

Under the "provision-then-dispute" requirements of the FCC's *Triennial Review Remand Order,* Verizon must provision a CLEC's order for UNE high-capacity loops and dedicated transport but may subsequently challenge the CLEC's right to obtain the element on an unbundled basis. If Verizon prevails in the dispute, it may back-bill the CLEC for the difference between the UNE rate and the rate for a substitute element or service.

The Department ruled that in such circumstances, Verizon may not impose late fees, but may request carrying charges, such as interest, on the back-billed amounts. *Compliance Order* at 23-24. Verizon's tariff provisions do not reflect both parts of this ruling — they allow Verizon to recover carrying charges but do not prohibit late fees. §§ 2.1.1.D.2, 2.1.1.E.1, 5.3.1.D.2,

5.3.1.E.1. The Department should require Verizon to state the provisions in a more balanced way, similarly to § 3.6.2.6 of the Arbitrated Amendment:

> In accordance with the Order on Compliance, in any case where Verizon, pursuant to Section 3.6.2.3, 3.6.2.3.1, or 3.6.2.5 above, is permitted to charge a higher rate upon the dispute being resolved in Verizon's favor, Verizon, upon resolution of the dispute, may not impose "late fees" but may request carrying charges, such as interest, on the difference between the UNE rate and the rate for the non-UNE facility or service.

D. Rate for Dark Fiber Substitute in the Event that Verizon Prevails in a "Provision-Then-Dispute" Situation (§ 17.1.1.E.1).

Similarly to the case of EELs that become non-compliant, the Department imposed a restriction on the rate that Verizon may charge for an analogous or substitute service for dark fiber transport if it prevails in a "provision-then-dispute" situation. The Department determined that it was appropriate to limit the rate for such service to the lowest rate at which the CLEC could have obtained the facility if the CLEC had not ordered it as a UNE in the first instance. *Compliance Order* at 25-27. Accordingly, the Arbitrated Amendment contains the following provision:

> In the case of Dark Fiber Transport (there being no analogous service under Verizon's access tariffs), the monthly recurring rate that Verizon may charge, and that ***CLEC Acronym TXT*** shall be obligated to pay, for each circuit shall be no more than the lowest rates ***CLEC Acronym TXT*** could have obtained in the first instance (for the facility to be repriced) had ***CLEC Acronym TXT*** not ordered such facility as a UNE.

Arbitrated Amendment, § 3.6.2.3.1.

The proposed tariff revisions contain no such limitation. *See* § 17.1.1.E.1. The Department should require Verizon to include language like that in section 3.6.2.3.1 of the Arbitrated Amendment, above, in the tariff, to make the tariff consistent with Department policy.

II. Changes That Should Have Been Made, but Were Not.

Verizon should have amended other parts of Tariff No. 17 to reflect rulings in this case. The following are examples of changes that Verizon failed to make.

A. Charges for Routine Network Modifications (§ 1.1.1A.2).

The Department has ruled repeatedly that Verizon is may not impose charges for routine network modifications that Verizon is obligated to perform under the TRO. *Arbitration Order* at 266-67; *Compliance Order* at 42. In particular, "Verizon is currently only allowed to assess engineering query and engineering work order charges with respect to routine network modifications for line sharing." *Compliance Order* at 42. For a regular unbundled DS1 or DS3 loop or dedicated transport circuit, *no* charge is permitted for routine network modifications.

On this point, the tariff is clear as mud. The tariff provides that Verizon will perform routine network modifications "at the rates and charges set forth in Part M, which are described in Part A, Section 3.3.2." § 1.1.1.A.2. Among the rates and charges described in Part A, § 3.3.2 are engineering query and engineering work order charges. § 3.3.2A.13, .14. Nothing in Part A, § 3.3.2 suggests that these charges are inapplicable to routine network modifications for DS1 and DS3 loops and dedicated transport and dark fiber transport, required by the *TRO*.

Further. the listings of charges under the sections of the tariff pertaining to individual UNEs contradict the Department's rulings. For example, section 5.3.4.A lists the non-recurring charges that apply to high-capacity loops (or links). Among these are engineering query and engineering work order charges, which apply "when charges for an associated routine network modification work activity (listed below) also apply." Among the work activities "listed below" are line and station transfers, clear defective pair, reassignment of non-working cable pair, and binder group reassignment. But these activities are precisely the types of routine network

modification for which Verizon may not charge in connection with the provisioning of a DS1 loop. *See* § 1.1.1.A.2 (listing, among other routine network modifications, rearranging of cable at existing splice points, line and station transfers, activating dead copper cable, and clearing a defective pair). At best, the tariff leaves the CLEC customer guessing as to whether the charge applies or not. At worst, Verizon disregarded the Department's orders concerning charges for routine network modifications. Neither situation is acceptable.

A similar situation exists in § 2.2.3.A, regarding interoffice transport. This section contains the same indefinite language regarding engineering query and engineering work order charges as in the high-capacity loop section (§ 5.3.4.A). Among the routine network modifications "listed below" in that section are installing a line card and installation and reconfiguration of various types of multiplexers. Again, these are precisely the types of activity for which no charge is permitted. *See* § 1.1.1.A.2 (listing, among other routine network modifications, deploying a new multiplexer or reconfiguring an existing multiplexer[2]).

The Department should require Verizon to eliminate from the tariff all confusing and obfuscatory language regarding routine network modifications. The tariff should state clearly that there are no charges for routine network modifications on DS1 and DS3 loops and dedicated transport and dark fiber transport, or for any associated engineering activity.

B. Failure to Include "Applicable Law" in Provision Governing Commingling Obligation (Part B, § 1.1.1.A.1).

The Arbitrated Agreement, § 3.11.1.1, expressly includes a reference to "other applicable law" as one of the authorities under which a CLEC may obtain a UNE that may be commingled with a wholesale service. Section 3.11.1.1 states:

[2] Although not specifically listed in § 1.1.1.A.2, installing a line card unquestionably is one of the routine network modifications required by the *TRO*. *Arbitration Order* at 230-31.

> Verizon will not prohibit the commingling of an unbundled Network Element or a combination of unbundled Network Elements obtained under the Agreement or Amended Agreement pursuant to 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51, or under a Verizon UNE tariff or under other applicable law, with Wholesale Services obtained from Verizon . . . .

The inclusion of the reference to "other applicable law" was a specific, disputed issue, and its inclusion was the result of the conference call among the parties and Staff on May 24, 2006.

Therefore, the Department should require Verizon to include "or under other applicable law" after "UNEs obtained under this tariff" in the second line of the second paragraph of § 1.1.1.A.1.

C. Use of Term "FTTP Loop."

Section 5.0.1.A of the tariff uses the term "fiber to the premises loop," even though the Department expressly rejected use of that term because it did not accurately reflect the FCC's unbundling rules. *Arbitration Order* at 97. The correct terms are "fiber to the home" and "fiber to the premises" loop. The tariff should reflect the proper terminology.

Conclusion

The Department's mandate to Verizon — to file a tariff consistent with the orders in this case — was clear, unambiguous, and incapable of misinterpretation. Verizon and a number of CLECs (including Conversent) recently completed work on the Arbitrated Amendment. It should have been a simple matter to incorporate the language of the Arbitrated Amendment into the tariff. Verizon's failure to comply with the Department's order means that the Department, Conversent, and no doubt other CLECs will expend needless time and effort making Verizon do what the Department directed. It is inappropriate for Verizon to make the Department and parties go through this process. In addition, given that the time to review the tariff filing was

short, there well may be inconsistencies between the tariff and the Department's orders beyond those pointed out above.

The Department should ensure that Verizon's Tariff No. 17 substantively reflects the rulings in this arbitration. The arbitration rulings reflect the Department's judgment as to the appropriate rules governing the relationship between Verizon and CLECs. For these reasons, the Department should require Verizon to make its entire Tariff No. 17 consistent with the rulings in the arbitration (and the resulting arbitrated interconnection agreement), including but not limited to the instances pointed out above. The Department should require Verizon to show that *all* of the arbitration rulings are reflected in the tariff, and that the rulings are incorporated accurately and completely.

June 21, 2006

Respectfully submitted,

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